United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-4273

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE W. IRMISCH,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD
and JOHN M. McLUCAS, ADMINISTRATOR
FEDERAL AVIATION ADMINISTRATION,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL TRANSPORTATION SAFETY BOARD

BRIEF FOR RESPONDENTS

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P/S

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

MORTON HOLLANDER,
DONALD ETRA,
Attorneys,
Civil Division,
Appellate Section,
Department of Justice,
Washington, D.C. 20530.

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STATUTES AND REGULATIONS:

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether petitioner improperly ignored the fact that the appropriate and prescribed standard of review is the substantial evidence test, which here requires summary affirmance of the Board's order and denial of the petition for review.

2. Whether substantial evidence, including corroborated testimony and documentation showing that icing conditions were forecast along petitioner's route of flight, supports the Board finding that petitioner flew into known icing conditions.

Whether substantial evidence, including corroborated testimony and official weight records, supports the Board's finding that petitioner flew an overloaded plane.

4. Whether the cause of the crash is at all relevant to the issues presented in the case.

STATEMENT OF THE CASE

Nature of the Case

Petitioner, George W. Irmisch, seeks review of an order of the National Transportation Safety Board suspending petitioner's commercial pilot certificate for sixty-days. (J.A. 319) [1/] The basis for the suspension is the finding that petitioner violated sections 91.31(a) and 91.9 [2/] of the Federal Aviation Regulations (FARs) in that he flew a Cessna 177 into known icing conditions although that type of plane was required to avoid icing conditions, and that he flew the plane when its weight exceeded its maximum certificated gross weight. (J.A. 5). The flight on which these violations occurred ended in a crash shortly after takeoff which killed one of Mr. Irmisch's three passengers, and seriously injured Mr. Irmisch and two passengers. (J.A. 4-5).

1/ "J.A." refers to the Joint Appendix filed with this Court.

2/ 14 C.F.R. 91.31(a) and 14 C.F.R. 91.9, set forth at p. 10, infra.

Statement of Facts

On December 28, 1974, petitioner, George Irmisch, was the holder of Commercial Pilot Certificate No. 057408161. On that day, petitioner filed an IFR (Instrument Flight Rules) flight plan with Buffalo Flight Service for a flight from Niagara International Airport, Buffalo, New York, to Clarksburg, West Virginia. (J.A. 241). Mr. Irmisch was the pilot of the Cessna 177, N 29496, used for this flight and he carried three passengers. (J.A. 180, 181).

At about 3:30 PM on December 28, 1974, Mr. Irmisch called the Buffalo FAA Flight Service Station to obtain the weather for his planned route of flight. (J.A. 182-183, 44). Mr. William Tubbs, a Flight Service Specialist and an FAA certified weather briefer, gave Mr. Irmisch a full briefing of the weather en route (J.A. 38, 45, 205). That briefing included a special weather advisory, denominated Airmet[3/] Foxtrot 4, as well as a regional forecast. (J.A. 41-42). The Airmet called for flight precautions for pilots in the area of interior New York, central and western Pennsylvania and the adjacent Great Lakes Area due to local moderate rime

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3/ An "Airmet" or "Airmet Advisory" is issued when the weather could be detrimental to a pilot or aircraft en route. (J.A. 40).

icing in clouds. (J.A. 41, 233). The regional forecast stated that icing was forecast with the freezing level sloping from 2000 to 5000 feet in New York and adjacent coastal waters; and light to occasionally moderate icing was forecast in clouds above the freezing level, mainly in western New York, west and central Pennsylvania, and the adjacent Great Lakes. (J.A. 234, 42). During the course of the briefing, Mr. Tubbs repeatedly cautioned Mr. Irmisch about icing conditions. (J.A. 242).

After receiving the weather briefing, Mr. Irmisch filed his flight plan by telephone with the Buffalo Flight Service Station. (J.A. 185). The flight plan called for a cruising altitude of 6000 feet and a planned 2 hour, 50 minute flight (J.A. 241). The plane Mr. Irmisch was using for the flight was a Cessna 177, N 29496. The FAA certificate for that particular model requires that each plane be placarded: "any icing conditions to be avoided." (J.A. 76). There was a placard to this effect directly above the center portion of the windscreen on the plane Mr. Irmisch used. (J.A., 76).

The maximum certificated gross weight allowed by the FAA for the Cessna 177 which Mr. Irmisch flew on the flight is 2,350 pounds (J.A. 75-76). On the flight, Mr. Irmisch was carrying 2527.5 lbs,[4/] or 177.5 lbs above the maximum allowable weight. (J.A. 75).

4/ The weight on the flight is a disputed issue of fact; see Point II, p. 14 infra. 2527.5 lbs is the figure that the Administrative Law Judge found and this finding was affirmed by the NTSB.

Mr. Irmisch and his three passengers took off from Niagara International Airport at about 4:35 PM on the afternoon of December 28, 1974. (J.A. 236). Ten minutes later, the following exchange took place between Mr. Irmisch (N29496) and Buffalo Departure Control-West (DR-W):

2145:19 GMT (4:45 PM local time)

DR-W : Cessna two nine four nine six Buf.

2145:27 GMT

DR-W : Two nine four nine six Buffalo how do you read.

2145:32 GMT

N29496 : Buffalo departure ah four nine six we've accumulated a heavy build-up of ice ---- run into a little problem.

2145:40 GMT

DR-W : Alright sir ah (unintelligible) ah you want to come into Buffalo or right into Niagara I.F.R.

2145:53 GMT

N29496 : I think we're gonna have to ditch it.

DR-W : Okay sir. (J.A. 237).

There was no further radio contact with Mr. Irmisch's plane which crashed minutes later, killing Benjamin Herst, one of the passengers, and seriously injuring Mr. Irmisch, and Carrie Berhalter and Mario Cassara, the other two passengers. (J.A. 4-5).

At about 5:00 PM, Henry Gardner who lives on Grand Island, New York, saw the tail lights of the plane across the street in front of his house. (J.A. 96). He went out

to the plane and noticed that there was a layer of ice extending from the tip to the middle of the right wing. (J.A. 103).

Irmisch, Berhalter and Cassara were taken to Kenmore Mercy Hospital. They were each weighed as part of the routine admissions process and their weights were recorded on their admissions records. (J.A. 113). An autopsy was performed on the deceased passenger, prior to which his body was weighed by the County Coroner's Office. (J.A. 106-107).

Seven pieces of the baggage from the plane were collected immediately after the accident by the Erie County Sheriff's Department. The bags were tagged with property receipts for identification and they remained under the exclusive control of Captain Peter Scaccia of the Sheriff's Department. (J.A. 118).

Administrative Proceedings

The FAA began an immediate investigation into this crash. The day after the crash, December 29, 1974, Theodore Dodson, an FAA General Aviation Operations Inspector, visited the accident site. (J.A. 65). Mr. Dodson noted that there was still a small layer of ice on the right wing three to four feet from the fuselage. (J.A. 80). Mr. Dodson also examined the baggage from the flight at the Sheriff's office and along with an NTSB investigator and Captain Scaccia, they estimated the weight of the

baggage. (J.A. 71-72). In an attempt to find out from Mr. Irmisch what had happened, Mr. Dodson and another FAA inspector interviewed Mr. Irmisch at Kenmore Mercy Hospital on January 7, 1975. (J.A. 83).

On February 12, 1975, Mr. Irmisch made out an accident report. (J.A. 204). In that report, Mr. Irmisch stated that he had received "a thorough weather briefing for the weather en route," (J.A. 204-205) and that he had a full fuel load of 48 gallons on board for the flight. (J.A. 211).

On April 18, 1975 Mr. Irmisch was served by the Administrator with a Notice of Proposed Certificate Action, in which the Administrator proposed to suspend Mr. Irmisch's airman certificate for a period of six months. (J.A. 4).

In response to the Notice of Proposed Certificate Action, Mr. Irmisch and his attorney requested an informal conference with the FAA, which was held on June 17, 1975. In preparation for that conference, Mr. Irmisch represented to his attorney that he carried 44 gallons of fuel on the December 28, 1974 flight. (J.A. 205, 208).

On October 8, 1975, the Administrator issued an Order of Suspension, ordering Mr. Irmisch's airman's certificate suspended for six months. (J.A. 4-5). The basis for the suspension was the finding that Mr. Irmisch had violated 14 C.F.R. 91.31(a), by operating an aircraft without compliance with the operating limits of that aircraft, and that

in so doing he also violated 14 C.F.R. 91.9, by carelessly operating an aircraft so as to endanger life and property. (J.A. 4-5).

Mr. Irmisch appealed the order of suspension and the matter was assigned to Administrative Law Judge John E. Faulk for a hearing, which was held on May 13, 1976 with both Mr. Irmisch and the Administrator represented by counsel. (J.A. 31-32).

At the hearing, Mr. Irmisch contested the charges that he flew into known icing conditions and that he flew an overloaded plane. (J.A. 185, 192). Mr. Irmisch also contended that icing was not the cause of the crash, but rather that his engine had ceased to operate. (J.A. 194-196).

After the hearing, on July 9, 1975, the Administrative Law Judge (ALJ) issued a written Initial Decision and Order. (J.A. 266-284). In that decision, the Law Judge found: "it is clear from the testimony of Mr. Tubbs, as well as a review of the Administrator's Exhibits Nos. 1 and 2, [Airmet Foxtrot 4 (J.A. 233) and the regional forecast (J.A. 234)] that the respondent [i.e., Irmisch] was apprised of known icing conditions and it is so found." (J.A. 273). The Law Judge also found that Mr. Irmisch did accumulate ice on the wing of his plane while on climbout from the airport. (J.A. 277). The Judge considered Mr. Irmisch's contention that there was an engine power failure, but on this point the Judge made a credibility finding against Mr. Irmisch.

(J.A. 278). The Judge also made a credibility finding against Mr. Irmisch on the weight issue and found that the aircraft exceeded its maximum certificated gross weight by at least 175 lbs. (J.A. 282). The Law Judge affirmed the Administrator's Order of Suspension but reduced the period of suspension to sixty days. (J.A. 283).

Mr. Irmisch appealed the ALJ's decision to the National Transportation Safety Board. (J.A. 288). Both sides fully briefed their cases to the Board, which rendered an Opinion and Order on October 18, 1976. (J.A. 312-319).

The Board found that the regional weather forecast given to Mr. Irmisch prior to his flight apprised him of known icing conditions. (J.A. 316). The Board considered Mr. Irmisch's contentions that the plane was not overloaded, but found no reason to disturb the Law Judge's credibility findings in favor of the Administrator on this point. (J.A. 318). The Board accordingly affirmed the Law Judge's findings of fact and the sixty-day suspension. (J.A. 319).

The petitioner filed his petition for review in this Court on December 15, 1976. On December 30, 1976, the Board stayed the effective date of petitioner's 60-day suspension "until the Board order is judicially affirmed." (J.A. 342).

STATUTE AND REGULATIONS INVOLVED

49 U.S.C. 1486 provides in pertinent part:

JUDICIAL REVIEW

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive.

14 C.F.R. 91.31 provides:

CIVIL AIRCRAFT OPERATING LIMITATIONS AND MARKING REQUIREMENTS.

(a) . . . no person may operate a civil aircraft without compliance with the operating limitations for that aircraft prescribed by the certificating authority of the country of registry.

14 C.F.R. 91.9 provides:

CARELESS OR RECKLESS OPERATION

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

ARGUMENT

I

THE SUBSTANTIAL EVIDENCE TEST GOVERNS REVIEW OF THE BOARD'S DECISION, AND WARRANTS SUMMARY AFFIRMANCE OF THE BOARD'S ORDER HERE.

Petitioner totally fails to comprehend and recognize that the proper statutory standard of review of a National Transportation Safety Board order is the substantial evidence test. 49 U.S.C. 1486(e). To the extent that petitioner even addresses himself to the point, he states as an issue:

> Whether or not the findings of fact and conclusions of law are supported by a preponderance of reliable, probative and substantial evidence illicited from the witnesses at the time of the hearing. (Pet. Br. 1)

Contrary to petitioner's assertion, the standard of review is not whether the findings of the Board are supported by a "preponderance" of evidence, but rather, as 49 U.S.C. 1486(e) explicitly provides: "the findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive." The Courts too are unanimous in holding that the substantial evidence test, and no other, applies to review of Board findings. Air East, Inc. v. NTSB, 512 F.2d 1227, 1233 (C.A. 3), certiorari denied, 423 U.S. 863 (1975); French v. C.A.B., 378 F.2d 468, 470 (C.A. 10, 1967); Stern v. Butterfield, 529 F.2d 407, 409 (C.A. 5, 1976); Doe v. Department of Transportation, 412 F.2d 675, 677 (C.A. 8, 1969).

Under the substantial evidence test, a petitioner such as Mr. Irmisch, has a heavy and formidable burden to overcome in order to overturn the findings and conclusions of the Administrator and the Board. As this Court itself has acknowledged: "It is not the business of courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directives of Congress. The Administrator is an expert in his field; this is the very reason he was given authority for the issuance of air safety regulations." Air Line Pilots Association, Int'l v. Quesada, 276 F.2d 892, 898 (C.A. 2, 1960).

Every issue that petitioner raises in his current appeal was raised by him before the Administrative Law Judge and before the Board. After reasoned consideration and evaluation of the evidence both the Law Judge and the Board found that substantial evidence supported the Administrator's charges that petitioner flew into known icing conditions, and that petitioner flew an overloaded plane. What petitioner is now asking, is to have this Court second-guess the triers of fact and to have the Court reweigh the credibility findings of the Law Judge and the Board. Such review is pure wastage of precious judicial time and, in no event, is that the kind of limited review prescribed by the Aviation Act. Indeed, as the Fifth Circuit recently explained, " as an appellate

court reviewing an administrative order, it is not our function to reevaluate the weight of the evidence or to reexamine credibility choices made by the finder of facts." Stern v. Butterfield, 529 F.2d 407, 409 (C.A. 5, 1976). Rather, as the Eighth Circuit put it, the weight and credibility of testimony is for the Board to determine. Doe v. D.O.T., 412 F.2d 675, 674, 677 (C.A. 8, 1969).

A review of the evidence supporting the Administrator's charges, set forth in Points II and III, infra, illustrates that substantial evidence fully supports the findings that petitioner flew into known icing conditions and flew an overloaded plane. We further submit that the evidence is so conclusive on these points that the Court should summarily affirm the Board's order suspending for 60 days petitioner's certificate, and should deny the instant petition for review.

II

THE ADMINISTRATOR'S FINDING THAT PETITIONER FLEW INTO KNOWN ICING CONDITIONS IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Mr. Irmisch acknowledged in his February 12, 1975 signed accident report that, prior to his December 28, 1974 flight, "I [Irmisch] received a thorough weather briefing for the weather en route." (J.A. 204-205). Mr. Irmisch received that briefing from William Tubbs, an FAA certified weather briefer who has been a Flight Service Specialist for over 18 years and has provided weather briefings for 27 years. (J.A. 38, 45). On several occasions during the briefing, Tubbs cautioned Mr. Irmisch about icing conditions. (J.A. 242). The briefing which Mr. Tubbs gave Mr. Irmisch included a regional area forecast as well as a special weather advisory, Airmet Foxtrot 4. (J.A. 49, 50).

The regional area forecast was for the area of New England, New York, Pennsylvania, Adjacent Great Lakes, New Jersey, and adjacent coastal waters. (J.A. 50, 234). That forecast stated:

> Icing is forecast with the freezing level from the surface to 3000 feet in Northern New England, sloping from 2000 to 5000 feet in Southern New England, New York, and adjacent coastal waters . . . Light icing is forecast in the clouds above [the freezing level], occasionally moderate [icing], mainly western New York, west and central Pennsylvania, and adjacent Great Lakes (J.A. 234, last para.; see also J.A. 42; J.A. 315, n. 8).

Mr. Irmisch argues (Pet. Br. 4)* that the forecast reference to "Northern (sic) New England, New York, and adjacent coastal waters," did not apply to western New York. It is the Administrator's position that a forecast that refers to New York applies to the entire state, including of course, the western portion of the state as well. (J.A. 52). The Board found that the phrase in question pertained to the entire state of New York, and explained, "The absence of any limiting adjective, such as 'eastern, southern, etc.' preceding the word 'New York,' logically means the forecast pertains to the entire state." (J.A. 315). It must be emphasized that even if Mr. Irmisch was confused about the applicability on the first part of the forecast, the latter part of the forecast predicted light to occasionally moderate icing in clouds above the freezing level, and the forecast was explicit that this condition was to be found mainly in western New York. (J.A. 234).

The Board fully considered Mr. Irmisch's contention made below and repeated here (Pet. Br. 3) that the weather briefer might have given him an outdated report on the cloud tops. The Board found, "The fact that the specialist gave respondent [Irmisch] what may have been an outdated report on cloud tops (4,000 feet) is not fatal to the Administrator's case inasmuch as icing could have occurred in clouds at altitudes as low as 2,000 feet." (J.A. 316, n. 12). According to his flight plan, Mr. Irmisch's planned to cruise at an altitude of 6,000 feet (J.A. 48).

* "Pet. Br." refers to Petitioner's Brief.

Mr. Irmisch also argues (Pet. Br. 3) that Mr. Tubbs testified that it was possible that he did not provide the freezing level to appellant. To put that testimony in perspective, Mr. Tubbs testified that it was his customary procedure to provide the freezing levels, and that, although it was "possible", it was "not very likely" that he did not provide the freezing levels. (J.A. 52-53). The Board found:

> Although respondent stresses in his brief that the FSS specialist testified it is "possible" that he did not give respondent the freezing level during the briefing (Tr. 22), the specialist's testimony on the whole clearly indicates that he did impart such information. We also note that respondent himself testified that the temperature was 36° (dew point 30°), which should in itself have alerted him to the likelihood that he would not have to ascend very far before he would reach the freezing level.

As part of his briefing, Mr. Irmisch was also given the information contained in Airmet Foxtrot 4. That special weather advisory stated that:

> flight precautions should be taken in interior New York, central and western Pennsylvania, and the adjacent Great Lakes due to local moderate rime icing in clouds. (J.A. 233, 41).

The Board found that because the Airmet referred only to "interior New York," it "arguably" did not pertain to western New York. (J.A. 315 n. 9). The Airmet did, however, by its very terms, explicitly apply to

central and western Pennsylvania, which were on the direct route of Mr. Irmisch's planned flight from Buffalo to Clarksburg, West Virginia. (J.A. 271). Moreover, at the hearing, Mr. Irmisch admitted that he knew Airmets were used to warn pilots of icing conditions (J.A. 204), but nonetheless, he did not request further information from the weather briefer. (J.A. 203).

Insofar as the capabilities of the Cessna 177 that Mr. Irmisch was flying, there is no dispute that the FAA required that this type plane be placarded to the effect that "any icing conditions to be avoided." (J.A. 76). The Cessna 177 which Mr. Irmisch was piloting had such a placard right above the central portion of the windscreen (J.A. 76).

As discussed in Point I, supra, the substantial evidence test governs judicial review of Board factual findings. 49 U.S.C. 1486(e); Air East, Inc. v. NTSB, 512 F.2d 1227, 1233-34 (C.A. 3), certiorari denied, 423 U.S. 863 (1975). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). While substantial evidence does not mean a scintilla of evidence, it does mean that a reviewing court "must rely on the ability of the hearing officer to make judgments on witnesses' credibility." Air East Inc., supra.

Mr. Irmisch's acknowledgment that he received a full weather briefing, Mr. Tubbs' testimony that he repeatedly cautioned Mr. Irmisch about icing conditions, the fact that the briefing included the regional forecast and Airmets Foxtrot 4, both of which forecast icing along Mr. Irmisch's flight route, constitutes substantial evidence supporting the Board's decision. This Court should therefore affirm the Board's finding that Mr. Irmisch violated 14 C.F.R. 91.31(a) by flying a plane into known icing conditions when that plane was required to avoid such conditions.

III

THE FINDING THAT MR. IRMISCH'S AIRCRAFT EXCEEDED ITS MAXIMUM CERTIFICATED GROSS WEIGHT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The maximum FAA certificated gross weight for the Cessna 177 which Mr. Irmisch piloted on December 28, 1974 is 2350 lbs. (J.A. 76). The Administrator computed that Mr. Irmisch was carrying 2527.5 lbs when the plane crashed, or 177.5 lbs. in excess of maximum certificated weight. (J.A. 75). Mr. Irmisch disputed the Administrator's computation and argued that he was only carrying 2341.5 lbs. on the flight, or just within 8.5 lbs. of the maximum allowable weight. (J.A. 192). The Law Judge made credibility findings against Mr. Irmisch as to the disputed weights of the fuel, passengers, and baggage, and accordingly found that Mr. Irmisch was indeed flying when his

aircraft exceeded its maximum certificated weight by at least 175 lbs. (J.A. 282). A comparison of the Administrator's and Mr. Irmisch's weight computations is presented below:

COMPONENTS OF GROSS WEIGHT		ADMINISTRATOR'S COMPUTATION	MR. IRMISCH'S COMPUTATION
Empty wt of plane:		1464.5 lbs. a/	1464.5 lbs b/
Wt of oil		15.0 c/	15.0 d/
Wt of fuel		(48 gal=)288.0 e/	(37 gal=)222.0 f/
Wt of passengers			
Irmisch	150 g/		140 i/
Berhalter	140 g/		120 i/
Cassara	190 g/		180 i/
Herst	160 h/		140 i/
Total pass wt.		640.0	580.0
Wt of baggage		120.0 j/	60.0 k/
TOTAL WT ON FLIGHT		2527.5 lbs. l/	2341.5 lbs. m/

a/ J.A. 75
b/ J.A. 188
c/ J.A. 75
d/ J.A. 188
e/ J.A. 75
f/ J.A. 188
g/ J.A. 133
h/ J.A. 107
i/ J.A. 188
j/ J.A. 72
k/ J.A. 191
l/ J.A. 75
m/ J.A. 192

The record illustrates that the Administrator's computations as to the disputed weights of the fuel, passengers, and baggage are supported by substantial evidence, and that the Law Judge was fully justified in making credibility findings against Mr. Irmisch as to these weights.

Weight of the fuel

The Administrator's conclusion that the fuel carried weighed 288 lbs. is based on his finding that Mr. Irmisch was carrying a full load, or 48 gallons, of fuel on the flight. The Administrator arrived at this conclusion on the basis of Mr. Irmisch's signed February 12, 1975 accident report that stated he was carrying 48 gallons of fuel. (J.A. 211). Similarly, during the course of the FAA investigation of the accident, the FAA inspectors verified that Mr. Irmisch was carrying a full load of fuel by questioning the base operator, Mr. Olsker,and his line personnel (J.A. 86).

At the hearing, Mr. Irmisch contended that he was only carrying 37 gallons, or 222 lbs., of fuel. However, in preparation for the informal conference that he and his counsel had with the FAA in June of 1975, Mr. Irmisch advised his counsel that he was carrying 44 gallons, or 264 lbs., of fuel (J.A. 205, 207-208). The third figure that Mr. Irmisch gave for his fuel load was the 48 gallon figure in his February, 1975 accident report. (J.A. 211).

Weight of Irmisch and passengers

The Administrator computed the total weight of Mr. Irmisch and his three passengers to be 640 lbs. (J.A. 74). The basis for this total was the weights of Irmisch (150 lbs.), Berhalter (140 lbs.), and Cassara (190 lbs.), as obtained from the admissions records at Kenmore Mercy Hospital, where these three were taken right after the crash. (J.A. 113). The weight of Mr. Herst (160 lbs.), who was killed in the crash, was obtained from the Erie County Medical Examiner's Office, where his body was weighed prior to an autopsy. (J.A. 107).

Mr. Irmisch computed the total weights of himself and his passengers at 580 lbs. This was based on his assertion that he weighed himself as 140 lbs. on the morning of the flight, and that Berhalter, Cassara and Herst allegedly told him they weighed 120, 180, and 140, respectively when he asked them their weights prior to their boarding the plane. (J.A. 188).

Although Irmisch stated that he weighed himself as 140 on the morning of the flight (J.A. 190), Irmisch's temporary airman's certificate listed his weight as 150 lbs. (J.A. 190), his permanent certificated listed his weight as 145 lbs. (J.A. 191), and his December 28, 1974 hospital admission record showed his weight to be 150 lbs. (J.A. 113).

Mr. Irmisch objects (Pet. Br. 9) that the Administrator's computation of the weights of the passengers was based on hearsay, because the nurse who took the weights was unable to testify. This objection is without merit. The technical rules of evidence do not apply to a Board administrative hearing. 49 C.F.R. 821.38, Nadiak v. C.A.B., 305 F.2d 588, 593 (C.A. 5, 1963), certiorari denied, 372 U.S. 913 (1963). Even if the strict rules of evidence did apply, the passengers' weights were obtained from records taken in the regular course of business at both the hospital and the medical examiner's office, and therefore the evidence would come within the business records exception to the hearsay rule.

Weight of the baggage

The Administrator computed the total weight of the baggage as 120 lbs., and Mr. Irmisch computed the total weight as 60 lbs. (J.A. 72, 191). Both the Administrator and Irmisch employed the same technique for estimating the weight, namely, picking up the bags and estimating their weight. (J.A. 72, 201). However, the Administrator's computation was based on a consensus of the total weight as obtained from the FAA inspector, the NTSB inspector and the Captain in the Erie County Sheriff's Office. (J.A. 124). The Administrator was also able to provide the Administrative Law Judge with a detailed description and estimated weight of each piece of baggage removed from the crash (J.A. 72).

In resolving the disputes regarding the weights of the fuel, the passengers, and the baggage, the Law Judge made credibility findings against Mr. Irmisch and explained (J.A. 281-282):

> In resolving the conflicting testimony with respect to the differences in weight of the passengers, the baggage and the fuel, a credibility choice must be made. That choice is made in favor of the Administrator. The official records of the hospital reflect a higher weight than that reported by the respondent [Irmisch]. There is no reason to doubt the official records of the hospital. Also, respondent's weight at the time of the incident is reported by the hospital records to be 150 pounds, which is substantiated by respondent's own entry on a temporary airman certificate. Also, there is no reason to doubt the validity of the weight of the decedent entered in the records of the County Coroner. As to the weight of the baggage, at least three individuals approximated the weight of the baggage by lifting it and each came to an approximate weight of 120 pounds, rather than a weight of 60 pounds as stated by the respondent. The difference between respondent's baggage weight and that offered by the Administrator is significant enough to cast doubt upon the respondent's estimate. As to the weight of the fuel on board, respondent has given three different figures as to the quantity of fuel placed on board. Mr. Dodson through his investigation, obtained information from the attendant as well as the owner of the aircraft that the aircraft was fueled to 48 gallons. Accordingly, it is found that the aircraft in question exceeded its maximum gross takeoff weight by at least 175 pounds, as charged.

The NTSB, in its review of the Law Judge's credibility choices,found no reason to disturb the Law Judge's findings. (J.A. 318). The facts of this case clearly support and fully justify the credibility choices made by the Law Judge and affirmed by the Board. Moreover, as the Fifth Circuit acknowledged it is not the function of an appellate court reviewing the Administrator's order "to reevaluate the weight of the evidence or to reexamine the credibility choices made by the finder of fact." Stern v. Butterfield, 529 F.2d 407 409 (C.A. 5, 1976). Accord: Doe v. Department of Transportation, 412 F.2d 674, 677 (C.A. 8, 1969); Nadiak v. C.A.B., supra, 305 F.2d at 592.

Credible, corroborated testimony as well as official weight records constitute substantial evidence supporting the Board's finding that Mr. Irmisch flew a plane when its weight exceeded the maximum allowable weight by at least 175 lbs. Accordingly, the Board's finding that Mr. Irmisch violated 14 C.F.R. 91.31(a) by flying an overloaded plane should also be upheld. 49 U.S.C. 1486(e).

IV

THE CAUSE OF THE CRASH IS IRRELEVANT

1. Petitioner argues (Pet. Br. 4-7) that the cause of the crash was not icing, but rather was that "the engine ceased operating." (Pet. Br. 4-5).[5/] The cause of the

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5/ These causes are by no means incompatible, since, as the Board noted, the engine might have ceased operating due to carburetor icing. (J.A. 317, n. 15).

crash is irrelevant to this case. The only issues properly presented are whether Mr. Irmisch violated 14 C.F.R. §§91.31(a) and 91.9, both by flying into known icing conditions and by flying a plane that exceeded its maximum allowable weight. To sustain a finding of a violation of an aviation regulation, all that need be shown is that the violation occured, and not, as petitioner assumes, that the violation caused a crash.[6/] Indeed, to support a finding that 14 C.F.R. 91.9 was violated, it is not even necessary to show that there was actual danger; a showing of inherent danger will suffice. Haines v. Department of Transportation, 449 F.2d 1073, 1076 (C.A.D.C., 1971).[7/] The inherent danger of flying a plane into weather conditions that the plane is not certificated for and the inherent danger of flying a plane which is overweight is clear.

2. The facts in the instant case illustrate all too vividly the consequences of cavalierly flauting air safety regulations. Here, the evidence is overwhelming that the crash was caused by icing. The best proof is Mr. Irmisch's

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6/ The principal purpose of the FARs is to promote safety and to avoid accidents (49 U.S.C. 1421(a)), not merely to serve as a standard for passing on pilot violations.

7/ "Proof of actual danger is unnecessary, for the regulation prohibits any careless or reckless practice in which danger is inherent." 449 F.2d at 1076.

own statement to Buffalo Departure Control prior to ditching: "Buffalo departure ah four nine six we've accumulated a heavy build-up of ice --- run into a little problem." (J.A. 237). Similarly, the witness who got to the plane within minutes of the crash found a layer of ice extending from the tip to the middle of the wing. (J.A. 103). The FAA inspector who visited the crash the following day also found ice on the wing. (J.A. 80).

Mr. Irmisch argued that the plane crashed because of engine failure and offered as proof a photograph allegedly showing that the propeller was not developing power at the time of impact (Pet. Br. 5). As the Board noted, that the engine was not developing power at the time of impact does not preclude a finding of icing, since Mr. Irmisch himself might have retarded the throttle prior to the crash or the engine might have failed due to carburetor icing. (J.A. 317, n. 15). The witness who testified about the position of the propeller in the photograph admitted that nothing conclusive about the engine could be determined merely from the proffered photograph (J.A. 224).

3. Mr. Irmisch contends that information received from him at an interview with FAA investigators on January 7, 1975, while Mr. Irmisch was still in the hospital, was "considered by the FAA to establish the alleged violations." (Pet. Br. 6). In sustaining the

Administrator's findings, neither the Administrative Law Judge, nor the Board, relied on the evidence obtained from Mr. Irmisch at the January 7, 1975 interview. (J.A. 318, n. 16). Neither do we rely on any of that evidence here.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the order of the National Transportation Safety Board should be summarily affirmed.

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

MORTON HOLLANDER,
DONALD ETRA,
Attorneys,
Civil Division,
Appellate Section,
Department of Justice,
Washington, D.C. 20530.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 1977, I served the foregoing Brief upon counsel, by causing a copy to be mailed, postage prepaid, to:

Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, New York 14202

DONALD ETRA, (202) 739-4785